No. 88-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA; LEONARD WILSON, Individually and as District Manager, Chicago Office of the Franchise Tax Board of the State of California; and B.M. RARANG, Individually and as Auditor, Chicago Office of the Franchise Tax Board of the State of California,

Petitioners,

v.

ALCAN ALUMINIUM LIMITED and IMPERIAL CHEMICAL INDUSTRIES PLC,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federal court should permit the foreign parent of a domestic corporation to avoid (1) the long-standing judicial policy, embodied in the Tax Injunction Act, barring federal court interference with the normal tax processes of the States, and (2) the normal rule that a shareholder cannot sue on behalf of a corporation.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

In this era of scaled-down federal funding of programs and growing state responsibility, nothing is more compelling to the States than the ability to raise tax revenue in the manner best suited to each State's needs and circumstances. The validity of California's unitary tax, which respondents seek to challenge, is not now before this Court. Nor is the particular form of tax chosen by California common to all States. The process by which respondents have sought to challenge that tax, however, concerns all state and local governments because they depend on an uninterrupted flow of tax revenues.

The federal courts and Congress have recognized that the States, in order to fulfill their role in our federal system, must have both substantive flexibility in designing their tax structures and procedural freedom in fashioning their refund and remedy systems. The States, therefore, have been allowed to handle challenges to their taxes within their own administrative and judicial forums without having to face litigation in federal courts all over the country. It is imperative that the States' normal tax collection processes not be disrupted and delayed by external litigation.

The Seventh Circuit's decision undercuts the powerful and longstanding policy against federal court interference with the normal course of state tax collection. That policy, which was developed by this Court early in our Nation's history, has been embodied as a clear congressional mandate in the Tax Injunction Act, 28 U.S.C. § 1341. The decision below also ignores the basic principle that a corporation cannot avoid restrictions on its own ability to litigate in a particular forum—here imposed by the Tax Injunction Act—by having a shareholder institute suit on its behalf. Moreover, although this case directly concerns foreign parent corporations of domestic taxpayers, the Seventh Circuit's reasoning is broad enough to open a door through which domestic corporate parents could enter as well, nullifying, at least for multistate corporations, the strong policy against federal court intervention in state tax disputes.

Should the judgment below be affirmed, state and local governments would be subjected to delay in the collection of needed taxes, and to litigation of a multiplicity of suits challenging their tax systems in the federal courts—indeed, even in federal courts outside the taxing jurisdiction. The ability of *amici*'s members to meet their sovereign responsibilities and the needs of their citizens would be substantially impaired. *Amici* therefore submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE AND INTRODUCTION

Amici adopt petitioners' statement of the case and would emphasize the following matters.

This case concerns the efforts of two foreign corporations to contest in a federal court outside California a California tax levied on their domestic subsidiaries doing business in that State. Respondents, Alcan Aluminium Ltd. (Alcan) and Imperial Chemical Industries PLC (Imperial), are foreign corporations doing business in California through wholly owned subsidiaries. The California Franchise Tax Board assessed the subsidiaries' tax using the California system of worldwide unitary income taxation.[2] That action is being challenged by

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[1] The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

[2] California's unitary business/formula apportionment method of accounting to determine the tax liability for companies doing business in California is commonly called a unitary tax system. *See*

the two subsidiaries before state administrative officials and courts in California. J.A. 76 ¶ 29; J.A. 53-54 ¶ 29.[3] The parent corporations also brought suit to challenge the tax imposed on their subsidiaries. They filed suit in federal district court in Illinois to enjoin the Board from assessing or levying the tax on their California subsidiaries on the ground that the tax violated the Foreign Commerce Clause. The district court held that respondents lacked standing, and dismissed the suits, noting that their domestic subsidiaries, the taxpayers, could raise the constitutional claim in their state court suits. Pet. App. A-27.

The Seventh Circuit reversed. The court first noted that this Court, in cases involving domestic corporations, including those with foreign subsidiaries, has rejected claims that the unitary method of tax account-

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Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 181-83 (1983); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 221-23 (1980); *Mobil Oil Corp. v. Vermont Comm'r of Taxes*, 445 U.S. 425, 439-42 (1980). This Court has recently reaffirmed that California's "three-factor formula 'has become . . . something of a benchmark against which other apportionment formulas are judged.'" *Amerada Hess Corp. v. Director, New Jersey Div. of Taxation*, 109 S. Ct. 1617, 1621-22 (1989), quoting *Container Corp.*, 463 U.S. at 170.

California is not alone in employing this method of taxation. All 46 jurisdictions (States and the District of Columbia) that assess a tax on or measured by income use an apportionment formula, *Chart of State Taxes*, 1 State Tax Guide 665 (CCH) (1988); 24 follow the Uniform Division of Income for Tax Purposes Act, 7A U.L.A. 331 (West Supp. 1989); and 24 permit or require combined reporting (Multistate Corporate Tax Almanac 1-212 to 1-214 (Panel Pub. 1989)). Of course, the validity of California's tax system as applied to respondents' subsidiaries is not before the Court in this case.

[3] *Alcan Aluminum Corp. v. Franchise Tax Bd.*, No. 0196604 (L.A. Cty. Sup. Ct., filed Apr. 15, 1977); and *Alcan Aluminum Corp. v. Franchise Tax Bd.*, No. 322638 (Sacramento Cty. Sup. Ct., filed Aug. 17, 1984). Imperial's subsidiary is presently protesting the calculations of its tax in proceedings before the Franchise Tax Board.

ing violates the Commerce Clause or Foreign Commerce Clause "by unfairly overstating the income attributable to operations in the taxing state. *See Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 180-84 (1983)." Pet. App. A-3 (citations omitted). The Court, however, has not determined the merits of the issue underlying this dispute over standing: whether the unitary tax violates the Foreign Commerce Clause when it is applied to domestic subsidiaries of foreign corporations. *See Container Corp.*, 463 U.S. at 189 n.26 and 195 n.32.

The court of appeals, acknowledging that shareholders like respondents cannot bring suit unless they demonstrate a direct and independent injury, found that the two grounds alleged by respondents were insufficient. The court rejected respondents' claims that requests for information from their subsidiaries, which the parent corporations might have to answer, imposed a direct burden on them as parent corporations. The court concluded that "the nominal incidence of compliance costs . . . would not, in itself, normally be determinative of 'direct' injury" because the costs can be viewed as increased overhead to the subsidiary's operations, thus affecting the parents merely "as shareholders in an enterprise faced with increased costs." Pet. App. A-14. The court also rejected the claim of double taxation, concluding that the tax could be viewed as "simply . . . added costs for the domestic subsidiary, experienced by the foreign parent as a decline in the after-tax profits of its California operations." *Id.* at A-14.

Instead, the court discerned an injury that respondents had not urged. The Seventh Circuit held that the California tax "diminishes the attractiveness of owning American subsidiaries in comparison with entering into contracts with independent companies as a means of engaging in foreign commerce." Pet. App. at A-14. This injury the court thought sufficient to give the parent corporations standing in federal court.[4] The court also con-

cluded that the Tax Injunction Act, 28 U.S.C. § 1341, was inapplicable because the non-taxpaying parent corporations could not bring suit in state court but must rely on the suits filed by their subsidiaries.

SUMMARY OF ARGUMENT

This is a classic case of forum shopping by two foreign parent corporations of unitary businesses challenging in federal court a state tax levied on their domestic subsidiaries. The multinational parent corporations are seeking to evade the restrictions of the Tax Injunction Act, 28 U.S.C. § 1341, which precludes federal court intervention where there is "a plain, speedy and efficient" state remedy.

The Seventh Circuit's decision seriously erodes the non-intervention principle expressed in the Tax Injunction Act and, if not reversed, would force States to endure protracted litigation in distant forums, thereby crippling state revenue administration and collection. State courts, which after all are familiar not only with their own law but with federal constitutional mandates and the precepts of this Court, regularly decide challenges to state taxes, which can, if necessary, be reviewed by the Court.

The court below also misapplied the settled rule that a shareholder lacks standing to challenge a law affecting his corporation unless he can demonstrate direct injury

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[4] Every other court of appeals that has examined whether foreign parents may sue in federal court to challenge taxes assessed against their domestic subsidiaries has ruled that the normal shareholder standing rules govern, and that the foreign parent corporations therefore lack standing. *EMI Ltd. v. Bennett*, 738 F.2d 994 (9th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593 (9th Cir.), *cert. denied*, 464 U.S. 1012 (1983); *Alcan Aluminum Ltd. v. Franchise Tax Board*, 558 F. Supp. 624 (S.D.N.Y.), *aff'd mem.*, 742 F.2d 1430 (2d Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984).

separate and distinct from that of the corporation. The court, while rejecting respondents' own allegations of direct harm, devised a rationale of independent injury that would virtually repeal the Tax Injunction Act for the benefit of non-resident owners of interstate businesses. This expansive theory of standing poses a grave danger for States because it could be applied to almost every tax contested by any out-of-state corporation.

Finally, the decision below disregards the strong national policy, based on principles of federalism, of allowing States to impose taxes and devise collection and review processes without federal intervention other than review by this Court. Apart from its specific errors, the decision is out of step with this Court's recent tax cases, which emphasize, often unanimously, the vitality and validity of federalism as living principle. *See e.g., Goldberg v. Sweet*, 109 S.Ct. 582 (1989) (state taxation of new forms of electronic commerce); *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619 (1988) (fair and nondiscriminatory state taxation not offensive to Commerce Clause, affirming principles of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). In any event, federal courts should not duplicate the work of state courts by prematurely supplying a federal forum but should require taxpayers to pursue state administrative and judicial remedies.

The failure of the court of appeals to respect state sovereignty simply encourages litigious corporate taxpayers to shop the country for a friendly forum, thereby diverting and dissipating scarce state resources from the collection of taxes to defending those taxes in distant federal courts.

ARGUMENT

I. THE TAX INJUNCTION ACT BARS AN ACTION IN FEDERAL COURT TO CHALLENGE A STATE TAX WHEN THE STATE PROVIDES A FORUM FOR SUCH A CHALLENGE.

The decision below permits respondents, foreign parent corporations of unitary businesses, to challenge in federal court a state tax that they do not pay; and, moreover, permits them to do so outside the taxing jurisdiction, in a district with little or no connection to the imposition or collection of the contested tax.[5] Respondents are forum shopping, seeking to evade the restriction imposed on federal court jurisdiction by the Tax Injunction Act, 28 U.S.C. § 1341.[6] That Act represents Congress's recognition of the havoc that could be

[5] See *State Tax Conference Focuses on Unitary, Mergers, and Compliance*, Tax Notes 1203, 1204 (June 5, 1989) (conference speaker suggests forum shopping for those dissatisfied with a State's application of a unitary tax).

[6] When Alcan filed this suit in Illinois, the Second Circuit had already ruled that Alcan did not have standing to maintain this kind of action there. *Alcan Aluminum Ltd. v. Franchise Tax Bd.*, 558 F. Supp. 624 (S.D.N.Y.), *aff'd mem.*, 742 F.2d 1430 (2d Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984). In addition, its California subsidiary had one suit pending in California state courts and one about to be filed; these suits protested the subsidiaries' taxes for the years 1965-71 and 1972-74. See n.3, *supra*. In the district court below, the Franchise Tax Board argued that Alcan's suit was barred by collateral estoppel, but the court did not rule on this objection because it dismissed the case for want of standing. In addition, although the Board's Chicago office audited the 1976 through 1978 returns of Alcan's subsidiary, there is no indication in the record that the returns for 1965 through 1975 were audited by the Chicago office. J.A. 68 ¶ 16.. *See Alcan Aluminum Ltd. v. Franchise Tax Bd.*, 558 F. Supp. 624 (S.D.N.Y. 1983).

Imperial brought suit in Illinois even though its subsidiary has never been audited by the Board's Chicago Office. It was audited only in New York and California (J.A. 43 ¶ 9), where suit was barred by the law of those circuits. See n.4, *supra*.

wrought on state tax systems by federal court suits, and prohibits such suits unless the state courts do not afford a sufficient remedy.[7]

The policy underlying the Tax Injunction Act is so strong and so firmly rooted in history that it hardly needs elaboration. It began with the doctrine of equitable restraint, which bars suits in equity "'in any case where plain, adequate and complete remedy may be had at law.'" *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932), quoting Section 16 of the Judiciary Act of 1789.[8] Equitable restraint carried "peculiar force in cases . . . brought to enjoin the collection of a state tax." *Rodgers*, 284 U.S. at 525. Federal injunctive relief was precluded because of the special importance of taxes to governments. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 107-09 (1981).

In 1937, Congress, concerned with what it saw as the threatened erosion of this policy by the federal courts, imposed restraint by statute. The Tax Injunction Act was designed to require challenges to state taxes to be litigated in state courts, and that is where they have been litigated.[9] As the court below acknowledged (Pet.

[7] Title 28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

[8] In an early decision, *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1871), the Court barred federal injunctive relief to a taxpayer because States rely on taxation to carry on government, and they must be assured a continuing source of revenue during litigation of the tax at issue.

[9] The Act was "first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981); see 81 Cong. Rec. 1415 (1937) (Statement of Sen. Bone); S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937). *See also Tully v. Griffin, Inc.*, 429 U.S. 68, 73

App. A-18), "[t]he Act has been interpreted broadly in light of Congress' intent 'to prevent federal-court interference with the assessment and collection of state taxes" (citing *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982)), and this Court "has also adopted a lenient construction of the 'plain, speedy and efficient' proviso" (citing *Grace Brethren*, 457 U.S. at 412-13, and *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512-14 (1981)).

Time has borne out the wisdom of Congress's determination that state courts are the appropriate forum for resolving challenges, including constitutional challenges, to state taxes. State courts have regularly entertained, and not infrequently upheld, constitutional challenges to taxes imposed by their state legislatures.[10]

There is no question here concerning the adequacy of the remedy afforded by the California courts to California taxpayers, including respondents' domestic subsidiaries, to contest the constitutionality of the State's unitary tax. In fact, Alcan's California subsidiary has pending in the California courts two suits seeking tax refunds; and Imperial's California subsidiary is presently challenging its tax through the State's administrative process, which is, of course, subject to judicial review. Although respondents cannot directly invoke these state remedies—because they are not California taxpayers—

(1976); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298-99 (1943).

[10] This Court has before it consolidated cases involving questions concerning refunds of state taxes found invalid by the state courts. *McKesson Corp. v. Florida Div. of Alcoholic Beverages & Tobacco*, No. 88-192; *American Trucking Ass'ns v. Arkansas Hwy. & Transp. Dept.*, No. 88-325. *See also, e.g., Huie v. Private Truck Council, Inc.*, 466 N.E.2d 435 (Ind. 1984); *Burlington N. R.R. Co. v. Board of Supervisors*, 418 N.W.2d 72 (Iowa 1988); *LaRoque v. State*, 178 Mont. 315, 583 P.2d 1059 (1978).

they are clearly in a position to direct their wholly owned subsidiaries in the pursuit of relief in the State's tribunals. No reason appears why respondents should be free to pursue their indirect claims in a distant federal forum that is more to their liking.[11]

The court below gave insufficient weight to the strong policy against federal interference with state tax proceedings. If the decision is allowed to stand, it will seriously erode the non-intervention principle embodied in the Tax Injunction Act. The reasoning of the Seventh Circuit is not restricted to foreign parents of domestic corporate taxpayers; its logic would apply equally to domestic corporate parents. Large multistate and multinational corporations could use their vast economic power [12]

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[11] Although respondents may not proceed in federal court, they have several alternative forums to the state courts. They may attempt to persuade the California Legislature that wholly owned subsidiaries of foreign corporations should receive special tax treatment. They may seek the intervention of the executive and legislative branches of the federal government. Multinational corporations in fact persuaded the Secretary of the Treasury to set up a working group with States using unitary tax systems. In response to the corporations' objections, many of the States, including California, have modified their statutes. 1986 Cal. Stat., ch. 660; 1988 Cal. Stat., ch. 989; Cal. Rev. & Tax Code § 25110 *et seq.* (Deering 1988). Similarly, if respondents believe that the state courts are not competent to rule on the constitutional validity of their own States' tax systems, they may appeal to Congress to change the Tax Injunction Act to give them a preference. They may not, however, do an end run around Congress's previous decision, expressed in that Act, that they may not proceed in federal court.

[12] The economic strength of multinational corporations exceeds that of many States. For example, Imperial has 118,600 employees, and its annual sales exceed $20.8 billion. Standard & Poor's 1365 (1989). Alcan has 63,000 employees and annual sales of $6.9 billion. *Id.* at 69. Imperial's sales exceed the annual revenues of all but six States. U.S. Dep't of Commerce, Bureau of the Census, *State Government Finances in 1987*, Table 3 (Sept. 1988). Alcan's

to cripple state revenue collection by challenging state taxes in federal courts far removed from the taxing jurisdiction, as in this case. To permit the ruling below to stand would be to repeal the Tax Injunction Act for the benefit of nonresident owners of corporations that object to state tax formulas for interstate businesses.

II. RESPONDENTS LACK STANDING IN FEDERAL COURT TO CHALLENGE A STATE TAX ON THEIR DOMESTIC SUBSIDIARIES.

In permitting this litigation to proceed, the court below not only gave insufficient weight to the Tax Injunction Act, it misapplied established principles of standing. The Seventh Circuit erred both in the standard it chose to measure standing and in concluding that respondents had suffered direct injury sufficient to confer standing on them.

The court began by acknowledging the applicability of "the well established rule that shareholders must ordinarily demonstrate a direct and independent injury to bring suit" (Pet. App. A-2), but considered this rule a prudential limitation on the court's exercise of jurisdiction rather than a constitutional limitation. *Id.* at A-5. The opinion then drew a distinction between cases involving issues "at the core" of the "prudential aspect of the standing question" (*id.* at A-10), such as "concerns about the limits on judicial power and the appropriateness of a particular plaintiff bringing a particular action" (*ibid.*), and cases that raise merely the "housekeeping concerns" (*id.* at A-11) of "avoid[ing] a multiplicity of suits and . . . conserv[ing] judicial resources." *Id.* at A-10-A-11. The court mistakenly concluded that this case fell into the second category, where the "underpinnings [of

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sales are greater than the annual revenues of 32 States (*ibid.*), and it has more employees than half the States (U.S. Dep't of Commerce, Bureau of the Census, *Public Employment in 1986*, Table 7-(March 1988)).

the standing issue] are weakest." *Id.* at 17.[13] This conclusion is fundamentally at odds with the historic policy of Congress and the federal courts, discussed above, to respect the integrity of state tax structures and procedures. It also offends the basic principles that define the role of the States in our federalist system of government.

Even under the "weak" standard deemed appropriate by the court below, respondents have shown no direct injury to themselves, independent of injury to their subsidiary corporations, that could support their standing to challenge the California tax.[14] Indeed, the Seventh Circuit rejected the respondents' own assertions of independent injury: the alleged burden on them caused by the State's requests for information from the taxpayer subsidiaries about the unitary business, and the alleged double taxation. See Pet. App. A-14. The Second and Ninth Circuits had already rejected claims like the first (*EMI Ltd. v. Bennett*, 738 F.2d 994 (9th Cir.), *cert. denied*, 469 U.S. 1073 (1984); *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593 (9th Cir.), *cert. denied*, 464 U.S. 1012 (1983); and *Alcan Aluminum Ltd. v. Franchise Tax Board*, 558 F.Supp. 624 (S.D.N.Y.), *aff'd mem.*, 742 F.2d 1430 (2d Cir. 1983), *cert. denied*, 464 U.S. 1041 (1984)), and the Ninth Circuit had also rejected claims like the second (*EMI*, 738 F.2d at 996; *Shell*, 709 F.2d at 595).

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[13] The court's view that the standing issue was "weak" may explain its puzzling references to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), which dealt with *abstention* from the exercise of federal jurisdiction. *Colorado River* did not raise the question posed by this case: whether federal jurisdiction exists to entertain a challenge to a state tax by corporations that are not even subject to the tax.

[14] *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982); *Pittsburgh & W.Va. Ry. v. United States*, 281 U.S. 479, 486-87 (1930).

Instead, the court supplied its own rationale for standing based on "the relationship between the foreign parents and their domestic subsidiaries: the subsidiaries are owned as instrumentalities of the foreign commerce of their parents." Pet. App. A-15. According to the court, the effect of the unitary tax formula may be to make taxable in California a greater part of the subsidiaries' income than if the parent corporations had engaged in the same foreign commerce through contracts with unaffiliated companies; therefore, it has the "potential . . . to penalize foreign ownership of American assets." *Ibid.* The court concluded that respondents therefore are injured "by the distortion" of their "choices about the manner in which international trade is to be conducted." *Id.* at A-17.[15]

This theory of standing is plainly wrong. The court failed to recognize that whenever a corporation contemplates engaging in business within another State, it must weigh a wide variety of tax and other obligations and burdens, in deciding whether to transact its business by itself, through a subsidiary, or under contract with outside companies, no matter what forms of taxes the State has. Thus, the court's theory would allow almost every out-of-state corporation, engaged in either interstate or foreign commerce, to challenge almost every tax in federal court. This radical theory sweeps far too broadly and should be rejected.

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[15] The court's theory of standing apparently was influenced by its view of the substantive claims raised by respondents. See Pet. App. A-17: "It is important that these injuries . . . have fueled a simmering trade controversy which has raised concerns about foreign retaliation and the country's ability to speak with one voice on matters of foreign commerce—concerns that are central to the purposes of the foreign commerce clause." Because this claim can certainly be raised in the California courts and then before this Court, there is no reason to disregard a congressional mandate and normal standing rules. To the contrary, the merits of a constitutional challenge are irrelevant to the determination whether standing exists. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

III. THE RESPECT AND COMITY OWED TO STATE GOVERNMENTS UNDER BASIC PRINCIPLES OF FEDERALISM PRECLUDE FEDERAL COURT INTERVENTION IN STATE TAX SYSTEMS.

The decision below, in its misapplication of a specific congressional enactment and of general principles of standing, disregards the importance of allowing state tax laws to be implemented, and state tax collection and review processes to proceed, without federal intervention. It simply ignores the fundamental role of the States in our federal system.

This Court, in its decisions on the general dynamics of state-federal interaction, has repeatedly reaffirmed the basic blueprint of our Nation as a carefully balanced structure of national and state governments, each with a vital role to play. While recognizing the supremacy of the national government in a long list of essential federal functions, the Court has recognized that the Constitution prescribed a continuing role for the States, not only as experimental laboratories of democracy (*see New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), but as sovereign entities with day-to-day responsibility for the many needs of a civilized society. In the tax field in particular, the Court, after a period of division and dispute, has issued a series of recent unanimous decisions enunciating clear principles governing what had been earlier described as "the sovereign right of the United States as a whole to let the States tax as they please." *Container Corp.*, 463 U.S. at 194.

For example, in *D.H. Holmes Co. v. McNamara*, 108 S.Ct. 1619 (1988), the Court emerged from the "quagmire" of its earlier decisions. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977), citing *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). *D.H. Holmes* unanimously reaffirmed the principle set forth in *Complete Auto Tran-*

sit, Inc. v. Brady, 430 U.S. 274 (1977), that so long as they adhered to general standards of fairness and nondiscrimination, the States could adopt the taxing methods deemed best by their elected legislatures without offending the Commerce Clause. Just this year, in *Goldberg v. Sweet*, 109 S.Ct. 582 (1989), a unanimous Court made clear that this state prerogative was flexible enough to adapt tax measures to new electronic forms of commerce never envisioned by the Nation's founders but indispensable today.

The same respect for state taxing authority has marked the Court's disposition of challenges to state taxation of unitary businesses on preemption grounds. *Shell Oil Co. v. Iowa Dept. of Revenue*, 109 S.Ct. 278 (1988), unanimously held that Congress, when it barred taxation of income derived from the Outer Continental Shelf, did not bar inclusion of such income in the tax base used to compute a State's apportioned share of the income of a unitary business. Similarly, in *Amerada Hess Corp. v. Director, New Jersey Division of Taxation*, 109 S.Ct. 1617 (1989), the Court, without dissent, confirmed that a State could apply different rules for deduction of a federal tax than those in the Internal Revenue Code.[16]

In short, this Court has reinvigorated the essential notion of our constitutional structure that the States have broad leeway to levy their own taxes provided only that they do so fairly, without discrimination against out-of-state interests, and without encroaching on legitimate powers of the national government. Within their own sphere, the States are allowed to fulfill their governmental responsibilities without interference from the federal courts. These principles stem from historic comity and, in the tax field, are reinforced by statutory mandate.

[16] *Amerada Hess* also rejected claims that the New Jersey tax rules violated the Commerce Clause and the Due Process and Equal Protection Clauses. 109 S.Ct. at 1625.

See also California v. Grace Brethren Church, 457 U.S. 393, 411-13 (1982) (no declaratory judgment action against state taxes); *Fair Assessment*, 454 U.S. at 107-11 (no Section 1983 action against state taxes).

Accordingly, in a case like the present one, the overriding question is whether there is any need for a federal court to interject itself into the state tax review process at an early stage, before that process has had an opportunity to work. Virtually all state tax cases come to this Court from the state courts, which have proved themselves to be responsive to federal constitutional mandates. See p. 10 n. 10 *supra*. The Court itself has upheld and relied on the analysis of the state courts. *See, e.g., Amerada Hess*, 109 S.Ct. at 1622-24. The need for duplicative consideration of such cases in the lower federal courts has not been demonstrated. There is simply no reason to fear that important constitutional challenges to state taxes will either fail to receive serious treatment in the state courts or that the decisions will escape review. Those challenges may come before this Court from the state courts just as from the lower federal courts. Whatever the validity of the Seventh Circuit's concerns about the merits of respondents' challenge, there is no justification for bending all the procedural rules and doing the violence to deep-seated principles of federalism that would be required to allow this case to be heard in federal court.

In this case, especially, it is abundantly clear that the court of appeals failed to give due deference to the sovereignty of the States. The decision below, if upheld, would contradict the entire thrust of this Court's decisions concerning the proper state-federal dynamic, would directly infringe the historic right of the States to implement their own tax policies without intervention by the federal courts, and would seriously undermine the specific protections of the Tax Injunction Act. It is important for this Court to clarify once again that comity

and deference to the States in the discharge of their governmental responsibilities is not a mere matter of "housekeeping" for the federal courts, but one of the vital constitutional precepts upon which this Nation is built.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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